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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 518

ROBERT STEPPS ..... *Petitioner*

v.

STATE OF ARKANSAS ..... *Respondent*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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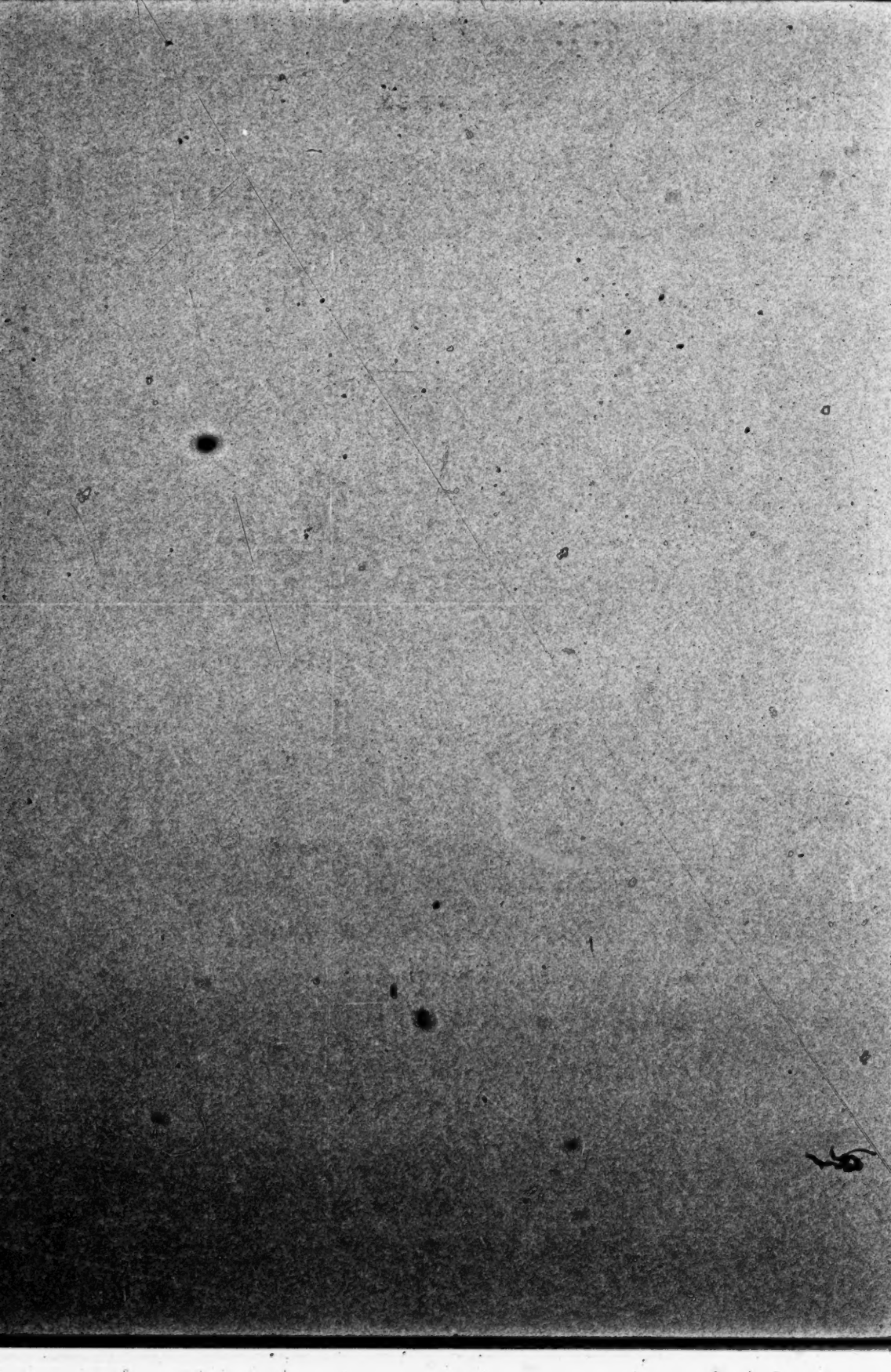

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BRIEF

Petitioner has filed a Petition for Writ of Certiorari to the Arkansas Supreme Court in the Supreme Court of the United States and this Court has requested respondent to file a response to the petition on the issue of the systematic limitation of Negroes on the jury. In view of this request that is the only point that we will discuss in our response.

2.

The petit jury panel should have been quashed for the systematic limitation of members of the Negro race.

This point was raised by petitioner in the trial court by two motions to quash the panel of petit jurors. The motions were overruled by the trial judge after hearing evidence through testimony of the Jefferson County Circuit Clerk. Petitioner saved his exceptions to the trial court's ruling on his motions and brought the point forward in his motion for new trial.

However, this point was not presented or urged as a point for reversal in the Supreme Court of Arkansas. It was not briefed or argued by either side and was not considered by the Supreme Court of Arkansas. See *Stepps* v. *State,* 242 Ark. 587. Nor was the point presented in the petition for rehearing to the Arkansas Supreme Court. The petition for rehearing filed by petitioner has been reproduced as Appendix A and will be found at the back of this brief. The point not having been raised in the Supreme Court of Arkansas in the original appeal or in the petition for rehearing cannot now be considered on a Petition for Writ of Certiorari in this court.

This court has held many times since *Terrell* v. *District of Columbia,* 243 U. S. 1, that all points in a petition for Writ of Certiorari must have been raised in the record and must have been urged and briefed below. See *California* v. *Taylor,* 353 U. S. 553, and *Lawn* v. *U. S.,* 355 U. S. 339.

In view of the fact that the Supreme Court of Arkansas was not urged to rule on this point we submit that

this question is not timely raised and should not be considered by this court on Petition for Writ of Certiorari.

Be that as it may, even had the point been properly preserved to this court, we believe it has no merit.

Before discussing the argument advanced by petitioner we will set out a few principles which we think this court should consider in this matter. Jury duty has been described by the Supreme Court of Arkansas as a right incident to citizenship, subject to statutory regulations. *Buchanan* v. *State,* 214 Ark. 835, 218 S.W. 2d 700 (1948). It is incumbent on every court to guard the constitutional guarantee of a fair trial by jury. *Anderson* v. *State,* 200 Ark. 516, 139 S.W. 2d 396 (1940). It is presumed that a jury meets all constitutional requirements and the burden of establishing the discrimination is upon the accused. *Tarrance* v. *Florida,* 188 U.S. 519 (1903). The mere allegation of discrimination without supporting evidence is insufficient. *Carter* v. *Texas,* 177 U.S. 442 (1900). A jury is not required to have proportional representation of all groups of the community in order to assure equal protection of law. *Virginia* v. *Rives,* 100 U.S. 313 (1879). Inequality or disproportionment of the number of Negroes finally selected as veniremen does not in itself constitute discrimination. *Akins* v. *Texas,* 325 U.S. 398 (1945). While a defendant has no right, constitutional or otherwise, to even have his race represented on a particular panel proportional racial limitation as such is forbidden. *Cassell* v. *Texas,* 339 U.S. 282 (1950). Simply stated, the race of the veniremen has no bearing and should not be considered by the jury commissioners. *Martin* v. *Texas,* 200 U.S. 316 (1906).

In support of his argument petitioner alleged that Ark. Stat. Ann. 3-227 requires that the race of the elector

be published on the poll tax books and infers that jurors are selected from those books. Further, he says on page 10 of his brief that this statute by requiring identification of the elector by race furnishes such a device that discriminatory result is humanly impossible to overcome.

First of all, the poll tax as a requisite for voting and jury service has been abolished in Arkansas. *Ark. Const. Amend.* 51 §17. Second, under our new system of voter registration the elector's race is not shown. *Faubus* v. *Fields*, 239 Ark. 241, 388 S.W. 2d 558. See *Sheppard* v. *State*, 239 Ark. 785, 394 S.W. 2d 624. Third, there is no proof to show *how* the Jury Commissioners selected the prospective jurors. The proof in this case does not reflect whether the jurors are selected from the voter registration list (race is not shown on this list) or by some other method. Therefore, the argument concerning discrimination by use of poll tax lists is not valid because they are no longer used in Arkansas and were not used in selecting this jury.

Also, in support of his argument petitioner cites the cases of *Bailey* v. *Henslee*, 287, F. 2d 936, and *Henslee* v. *Stewart*, 311 F. 2d 691. These cases are clearly distinguishable from the case at bar. The *Stewart* case in quoting from *Bailey* listed several factors which would reflect discrimination in the selection of a jury. Among them are as follows and we quote:

> " . . . Here there is a device for race identification with possibility of abuse; . . . here there is an element of recurrence of the same negro names; . . . "

In the case at bar there is no device for race identification with possibility of abuse because poll tax books are no longer used. Here, there is no proof of the recurrence of the same negro names on the jury lists.

CONCLUSION

We submit that because of the failure to present the point on appeal to the Supreme Court of Arkansas and because of the failure to prove that there is a systematic limitation of members of the Negro race on petit juries in Jefferson County, Arkansas, this petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOE PURCELL
Attorney General

Attorney for Respondent

APPENDIX A

SUPREME COURT OF ARKANSAS

ROBERT STEPPS,
Appellant

VS. No. 5252 PETITION FOR REHEARING

STATE OF ARKANSAS,
Appellee

Comes Robert Stepps, the appellant, and for his petition states:

I

The appellant states that this Court has overlooked and failed to apply its own previous decisions to the facts of this case.

(a.) Arkansas Statute 43-1204, makes no mention of the term "substantial compliance". To the contrary, as this Honorable Court has held in the past in *McCoy* v. *State*, 46 Ark. 141, omission of the clerk to furnish a defendant indictment for murder is grounds for a new trial. The appellant had filed his Motion to Quash in ample time, the bench warrant and information was not even prepared until three days after appellant was placed in jail, and then never delivered to him.

(b.) Arkansas Statute 43-601. This Court has consistently held that this statute requires that the arresting officers carry the accused forthwith before a magistrate; ref. *Hollman* v. *State*, 235 Ark. 664, wherein the Court used this language: "It is also true that the arresting officers did not take him before a magistrate *as the statute re-*

quires.'' Referring to Arkansas Statute 43-601, *Moore* v. *State,* 229 Ark. 335, cites *State* v. *Browning,* 206 Ark. 791, as standing for the proposition that this statute is directory, not mandatory. After reading the Browning case the appellant submits that this language is not used in the Browning case. Reference is also made to the rights of the accused enumerated in the Arkansas Constitution, Article 2, Section 10.

II

That the appellant states that this Honorable Court has apparently misinterpreted the appellant's contention regarding the witness Steve Thompson's testimony.

First, *Washington* v. *State,* 227 Ark. 255 concerns statements made by the witness on the witness stand, not the prosecuting attorney making prejudicial and inflamatory remarks to the Court and the jury about wholly incompetent evidence. To allow any trace of the statements made by the witness and the prosecution concerning kicking, infects the minds of the jury and through a needless act on the prosecution's part, necessitates a new trial.

III

That the appellant's attorneys have now ascertained that a short time after the trial the deceased's knife was ''found.'' The appellant submits that in a trial for murder where self-defense is the plea, the accused has an absolute right to have the arresting authorities bring both weapons to Court. In this case the officers brought only the gun. This action on the part of the State denies the accused due process of law.

Wherefore, appellant prays that this petition be granted for the foregoing reasons.

BROCKMAN & BROCKMAN

/s/ E. W. Brockman, Jr.
Attorney for Appellant

The undersigned hereby certifies that the foregoing petition for rehearing has merit and that it is submitted in good faith and not for purposes of delay.

/s/ E. W. Brockman, Jr.
Counsel for Appellant

CERTIFICATE OF SERVICE

I, E. W. Brockman, Jr., one of the attorneys of record for the appellant herein, certify that a copy of the foregoing petition for rehearing has this date been mailed to Joe Purcell, Attorney General of the State of Arkansas, Justice Building, Little Rock, Arkansas. May 25, 1967.

/s/ E. W. Brockman, Jr.